Summitville Tiles, Inc. *and* Summitville Laboratories Division of Summitville Tiles, Inc. *and* United Steelworkers of America, AFL–CIO. Cases 8–CA–19867, 8–CA–20211, and 8–CA–20159

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On February 14, 1989, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondents filed exceptions and a supporting brief, and the General Counsel, the Charging Party, and the Respondent Summitville Tiles, Inc. (Summitville Tiles or the Company) filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified.

1. The judge found that Summitville Tiles violated Section 8(a)(1) and (4) of the Act by filing a state court lawsuit against employees Michael Cogley and Douglas Jackson in retaliation for the filing of Board charges and a civil action against Summitville Tiles. We agree for the following reasons.[3]

On October 31, 1986, the Union, on behalf of Cogley and Jackson, filed 8(a)(3) charges against Summitville Tiles, but subsequently withdrew them. On November 6, 1986, Cogley and Jackson filed a state court civil suit against Summitville Tiles for assault and wrongful discharge. On January 5, 1987,[4] the Union again filed 8(a)(3) charges on behalf of Cogley and Jackson, but subsequently withdrew them. On February 20, the Union for a third time filed the 8(a)(3) charges, and the General Counsel issued a complaint on April 30. On May 21, Cogley and Jackson filed a motion to dismiss their civil suit.

On May 29, Summitville Tiles initiated a state court civil suit against Cogley and Jackson and codefendants John Roe and Richard Doe. The complaint states that the ''identities and activities'' of Doe and Roe ''are currently not fully known,'' but they ''are believed to be co-conspirators as employees, officers, agents or members of the United Steelworkers of America.''

The complaint alleges a count of malicious prosecution by Cogley and Jackson based on the filing of three unfair labor practice charges, the withdrawal of the first two charges, and the filing and dismissal of the employees' civil suit. Doe and Roe are named in this count as individuals who may have participated with Cogley and Jackson in the filing of the initial unfair labor practice charge.

The complaint also alleges a count of civil conspiracy against all the defendants. More specifically, the complaint states, inter alia, that ''COGLEY and JACKSON in conjunction with ROE and DOE developed a diverse ongoing program of conspiratorial harassment as directed against the Plaintiff . . . and evidenced in multiple National Labor Relations Board filings, subsequent withdrawals of filings and repetitive refiling of the identical charge . . . while at the same time seeking identical relief for alleged 'wrongful discharge' in State Court litigation.'' In addition, the complaint states that the defendants' conduct ''was and is contrary to the long established doctrine of federal labor law and federal agency pre-emption, which doctrine was known or should have been known by DOE and ROE, as established members, officers, employees and/or representatives of a national labor organization.''

In its lawsuit, the Company sought a total of $20,000 in compensatory damages ($10,000 for mali-

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondents' allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the decision, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondents in his analysis or discussion of the evidence.

In sec. D. of his decision, the judge found that Summitville Tiles discharged Roger and Jennie Minor on December 12, 1987. In fact, they were discharged on December 12, 1986.

The Union argues that Summitville Tiles disparately enforced its disciplinary rules against Roger Minor. Minor suffered a motorcycle accident, but reported his injury as a football accident to collect insurance. Minor was terminated for the false report. The Union claims that Minor's supervisor, David Bartholomew, also falsely reported a motorcycle injury as another type of accident to collect insurance, but was not disciplined. Even assuming that Bartholomew falsely reported his motorcycle accident, the record contains no evidence that the Company knew of Bartholomew's falsification at the time of Minor's discharge. Without any evidence that the Company was aware of Bartholomew's purported falsification at the time the Company discharged Minor, we cannot find any disparate treatment in discharging Minor for falsely reporting an injury to obtain coverage under the Company's insurance plan.

[2] Pursuant to the reasoning of his dissent in *Redd-I Inc.*, 290 NLRB 1115 (1988), Chairman Stephens would hold that Sec. 10(b) bars the finding that Respondent Summitville Laboratories Division of Summitville Tiles, Inc., violated Sec. 8(a)(5) through unilateral changes promulgated in its March 1987 handbook. Although he agrees with the judge that a general refusal-to-bargain charge is sufficiently broad to encompass an unlawful unilateral change, he does not find it acceptable to litigate a change on which, as in this case, a particular unfair labor practice charge has been filed and then withdrawn. The chairman also notes that the general unfair labor practice charge on which the 8(a)(5) portions of the complaint were predicated specifies that the conduct it encompasses commenced ''on or about May 5, 1987.'' This is an additional reason that the charge could not reasonably have been construed as covering the issuance of the handbook.

[3] We conform the judge's Conclusions of Law to his finding that Summitville Tiles' lawsuit independently violated Sec. 8(a)(1).

[4] All subsequent dates are in 1987, unless specified otherwise.

cious prosecution and $10,000 for civil conspiracy). In addition, the Company sought $100,000 in exemplary-punitive damages and reasonable attorneys' fees.

In August, the state court granted summary judgment in favor of Cogley and Jackson. The court ruled that Summitville Tiles had failed to show a seizure of person or property required by Ohio law to maintain a malicious prosecution action and determined that the Board preempted the court's jurisdiction in adjudicating the issues raised by the conspiracy claim. On November 16, 1988, the state appellate court affirmed the lower court's granting of summary judgment.

In finding that Summitville Tiles violated Section 8(a)(1) and (4) of the Act, the judge noted that Section 7 of the Act protects employees who seek to improve working conditions through the auspices of administrative and judicial forums, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), and the filing of labor-related lawsuits and Board charges constitute two such activities protected from employer retaliation by Section 8(a)(1) and (4), respectively. *Trinity Trucking & Materials Corp*., 221 NLRB 364 (1975); *Kansas Refined Helium Co*., 242 NLRB 744 (1979), enfd. 683 F.2d 1296 (10th Cir. 1982). Summitville Tiles testified that it continued its suit, even though the employees withdrew their suit, to recover the Company's expenses. The judge found that Summitville Tiles' efforts went beyond recovering expenses because the Company sought punitive damages from the employees and conceded in its testimony that a purpose of its litigation was to retaliate against the Union for filing charges on behalf of Cogley and Jackson.

The judge stated that the Board may enjoin an employer's state court action for malicious prosecution if the lawsuit is baseless, as well as filed for retaliatory purposes. *Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). The judge found that the motive for filing the lawsuit was to retaliate against the employees and the Union for filing unfair labor practice charges, that the Company's civil action was preempted by Federal law, that the Company's suit lacked a reasonable basis in fact and law, and that Cogley's and Jackson's resort to the legal process to regain their jobs could not be defined as malicious prosecution. The judge recommended that Summitville Tiles be ordered to withdraw its lawsuit.

The judge correctly stated that employees filing labor-related civil suits and unfair labor practice charges are protected from employer reprisals by Section 8(a)(1) and (4), respectively.[5] Similarly, the Board has held that where, as here, the charge is filed by a union, it is a violation of Section 8(a)(4) and (1) for an employer to retaliate against an employee because that employee is named in the charge. *Murcole, Inc*., 204 NLRB 228, 237 (1973).

In *Johnson's Restaurant*, the Supreme Court held that establishing a retaliatory motive and a lack of reasonable basis in fact or law are both essential prerequisites to *enjoin* prosecution of a state court lawsuit. But the Court also held that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit will be deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, may proceed to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit. See *Phoenix Newspapers*, 294 NLRB 47 (1989).

Here, the Company's lawsuit is no longer pending, and the Company did not prevail. Thus, the merits of the suit have already been adjudicated against the Company, and we need only decide whether the Company filed the lawsuit against Cogley and Jackson for retaliatory reasons.[6]

We find that Summitville Tiles conceded a retaliatory motive in its testimony. Summitville Tiles' vice president of administration, David Johnson, testified as follows:

> Q. Did you have any information indicating to you that you'd ever be able to successfully satisfy any judgment you received from Doug Jackson or Mike Cogley?
>
> A. My—my target was the United States—the U. S. Steelworkers' Union,—
>
> Q. And was that—
>
> A. —who was named in that suit.
>
> Q. Okay. So, your—is it fair to say your real target was the union because you believed they'd harassed you in filing these unfair labor practice charges and in seeking to represent your workers?
>
> A. To the extent that they had a role in this. Yes. In this case.

This testimony explicitly admits a retaliatory motive against the Union because of the Union's filing of charges. As explained below, we find that Summitville Tiles also intended to retaliate against Cogley and Jackson.

In its lawsuit, the Company made little effort to distinguish the conduct of Cogley and Jackson from that of the Union. To the contrary, the pleadings establish

[5] We find that the Company has not satisfied its burden of showing that the filing of the unfair labor practice charges and the employees' state court lawsuit were undertaken in bad faith and therefore did not constitute activities protected by the Act.

[6] Accordingly, we need not address whether the Company's lawsuit lacked a reasonable basis in fact and law. Chairman Stephens would expressly find that the Company's lawsuit lacked a reasonable basis in fact and law.

Given our decision concerning the Company's motivation in filing the lawsuit, we find it unnecessary to pass on whether the Company's suit was preempted by Federal law. Even if the suit were preempted, the nature of our inquiry would remain the same. In other words, we would still examine whether the Company acted with a retaliatory motive to determine if the filing of the suit violated the Act. See *American Pacific Concrete Pipe Co*., 292 NLRB 1264 (1989).

that the Company viewed the employees and the Union as acting in concert. In the malicious prosecution count, the Company claimed that the employees were primarily responsible for the filing of unfair labor practice charges. In fact, these charges were filed by the Union, not the employees. In the civil conspiracy count, the Company alleged that Cogley and Jackson, acting in conjunction with Union Representatives Doe and Roe, developed a plan to harass the Company by instituting and withdrawing litigation before the National Labor Relations Board and the state court. This count clearly linked the Union and the employees together and claimed they were jointly responsible for all the litigation instigated against the Company. Based on the Company's admission that it filed its lawsuit with a retaliatory motive against the Union and based further on the pleadings themselves, which alleged a close relationship between the Union and the employees, it is reasonable to infer that the Company also intended to retaliate against Cogley and Jackson because of what the Company believed their role to be in the National Labor Relations Board and state court litigation.

Further, in agreement with the judge, we rely on the fact that Summitville Tiles' lawsuit demanded punitive damages as evidence of the lawsuit's retaliatory motive.[7]

Finally, we rely on the contemporaneous unfair labor practices, including the unlawful discharges of Cogley and Jackson, which evidence Summitville Tiles' antiunion animus directed at Cogley and Jackson, to support our finding that the lawsuit was intended to retaliate against Cogley and Jackson because of their protected concerted activities.

Accordingly, we adopt the judge's finding that Summitville Tiles, by initiating and maintaining a lawsuit against Cogley and Jackson, violated Section 8(a)(1) and (4).[8]

2. The judge found that Summitville Tiles disparately enforced its no-solicitation and no-distribution rules in violation of Section 8(a)(1) of the Act.[9] For the following reasons, we reverse.

The judge relied on five incidents to evidence the Company's alleged disparate enforcement. First, Michael Cogley observed an employee wearing a ''vote no'' hat solicit a mill operator at the Company's Summitville facility during worktime; Supervisor Bob Miller noticed the solicitation, but took no action. Second, Douglas Jackson overheard Supervisor Robert Christen tell an employee that the Union was no good. Third, former employee Janet Lautzenheiser recalled that employee Frank Savonna spoke against the Union to employees in the grinder room at the Company's Pekin facility during worktime; Savonna's conversations with the employees occurred in the presence of a foreman. Fourth, Roger Minor observed a colleague during her worktime passing out antiunion literature 1 week before the election. Finally, the judge found that the Company displayed antiunion material in its plants, but did not tolerate the posting of prounion literature on company property.

Section 8(c) of the Act permits an employer and its agents to express their views on unionization as long as the opinions do not contain proscribed threats or promises. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969). Further, absent evidence that a union does not have sufficient means to communicate with employees, an employer does not violate the Act by enforcing a valid no-solicitation rule while engaging in antiunion solicitations of its own. *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 364 (1958).[10] The Christen incident involves a supervisor engaging in antiunion solicitation; it is not an example of an employer representative permitting an antiunion employee to solicit during worktime. There is no evidence that the Union was unable to communicate with employees. Further, the complaint does not allege, nor does the record show, that Christen's conduct was coercive. In sum, the fact that a supervisor lawfully engaged in campaign activity simply does not support the judge's finding of disparate treatment of prounion versus antiunion employees.

Similarly, the judge erred in relying on Summitville Tiles' posting of material on its property. The record indicates that Summitville Tiles prohibited both prounion and antiunion employees from posting materials at its facilities. The Company merely exercised its free-speech right in posting its own materials concerning unionization, and no party challenges the contents of the materials as unlawfully coercive. If an employer may prohibit employee solicitation during worktime while engaging in soliciting of its own without violating the Act, *Nutone*, supra, then an employer that is uniformly enforcing a no-posting-by-employees rule may post its own materials on company property.[11]

[7] Member Cracraft finds it unnecessary to rely on the fact that Summitville Tiles' lawsuit sought punitive damages as evidence of the lawsuit's retaliatory motive.

[8] We shall modify the judge's recommended Order to reflect that the lawsuit is no longer pending.

[9] The judge also determined that this complaint allegation was not time barred by Sec. 10(b). The filed charges did not specifically include this allegation. The judge, citing *Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988), and *Redd-I, Inc*., 290 NLRB 1115 (1988), correctly found that the complaint allegation was closely related to the charges. The judge also noted that the charge forms used by the Union contain the preprinted language ''the employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Sec. 7 of the Act.'' We note that the Board, in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), overruled precedent pertaining to the preprinted charge form language.

[10] The Board has cited *Nutone* for the general proposition that ''no-solicitation, no-distribution rules are not binding upon employers.'' *St. Francis Hospital*, 263 NLRB 834, 835 (1982), enfd. 729 F.2d 844 (D.C. Cir. 1984).

[11] Concerning the fourth incident mentioned above, the judge overlooked Minor's testimony that he could not be sure a supervisor observed this incident. Without a showing that the Company was aware of the distribution of antiunion literature, this incident cannot serve as a basis for finding disparate enforcement of the no-distribution rule.

Only two incidents remain. The solicitations of the mill operator and employees in the grinder room took place at two separate facilities that employ several hundred employees, and occurred over a 3-month period during the Union's organizational campaign. Under all the circumstances, we find that these two incidents are too isolated to satisfy the General Counsel's burden of establishing by a preponderance of the evidence that the no-solicitation and no-distribution rules were disparately enforced. See *Seng Co*., 210 NLRB 936 (1974); *Emerson Electric Co*., 187 NLRB 294 fn. 2 (1970).

Accordingly, we shall dismiss the complaint allegations that Summitville Tiles unlawfully enforced its no-solicitation and no-distribution rules.

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusion of Law 1, and renumber the subsequent Conclusions of Law.

2. Substitute the following for the judge's Conclusion of Law 3 and renumber as Conclusion of Law 2.

''2. By initiating and maintaining a civil action for malicious prosecution and civil conspiracy against Michael Cogley, Douglas Jackson, and others in retaliation for their protected concerted activities, Respondent Summitville Tiles violated Section 8(a)(1) and (4) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Summitville Tiles, Inc., and Summitville Laboratories Division of Summitville Tiles, Inc., Minerva and Summitville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph A, 1(b) and reletter subsequent paragraphs accordingly.

2. Substitute as paragraph A, 1(b) the following for the judge's paragraph A, 1(c).

''(b) Initiating or maintaining a baseless lawsuit against employees in retaliation for their protected concerted activities.''

3. Substitute the following for paragraph A, 2(c).

''(c) Reimburse Michael Cogley, Douglas Jackson, and the Union for all legal expenses incurred in the defense of the Respondent's lawsuit (87–Civ–625), including the appeal, in the manner set forth in the remedy section of the judge's decision.''

4. Substitute the attached Appendix A for that of the administrative law judge.

CHAIRMAN STEPHENS, dissenting in part.

Pursuant to the reasoning of my dissent in *Redd-I, Inc*., 290 NLRB 1115 (1988), I would hold that Section 10(b) bars the finding that Respondent Summitville Laboratories Division of Summitville Tiles, Inc., violated Section 8(a)(5) through unilateral changes promulgated in its March 1987 handbook. Although I agree with the judge that a general refusal-to-bargain charge is sufficiently broad to encompass an unlawful unilateral change, I do not find it acceptable to litigate a change on which, as in this case, a particular unfair labor practice charge has been filed and then withdrawn. I also note that the general unfair labor practice charge on which the 8(a)(5) portions of the complaint were predicated specifies that the conduct it encompasses commenced ''on or about May 5, 1987.'' This is an additional reason that the charge could not reasonably have been construed as covering the issuance of the handbook.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employees because of their union activities or discriminate in any other manner with respect to their hire or tenure of employment or any term or condition of employment, in violation of Section 8(a)(3) and (1) of the Act.

WE WILL NOT initiate or maintain a baseless lawsuit against employees in retaliation for their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Michael Cogley and Douglas Jackson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharges of Michael Cogley and Douglas Jackson and notify them in writing that this has been done and that evidence of the discharges will not be used against them in future personnel actions.

WE WILL reimburse Michael Cogley, Douglas Jackson, and the Union for all legal expenses incurred in

the defense of our lawsuit (87–CIV–625), including the appeal, plus interest.

SUMMITVILLE TILES, INC.

Rufus L. Warr, Esq., for the General Counsel.
Theodore M. Mann Sr. and *Theodore M. Mann Jr., Esqs*., of Cleveland, Ohio, for the Respondents.
James S. Gwin, Esq. (Gutierrez, Mackey & Gwin), of Canton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried at Canton, Ohio, on November 3–5 and 17–19 and December 1–2, 1988. The charges were filed by the Union on February 18, 1987, in Case 8–CA–19867, on June 9, 1987, in Case 8–CA–20159, and on July 1, 1987, in Case 8–CA–20211. The original complaint was issued on April 30, 1987, an amended consolidated complaint was issued on July 31, 1987, and a second amended consolidated complaint was issued on August 28, 1987, which was amended on October 23, 1987. The complaints charge the Respondents, Summitville Tiles, Inc. (Summitville Tiles) and Summitville Laboratories Division of Summitville Tiles, Inc. (Summitville Laboratories), with violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). The primary issues in the complaints are: (l) whether Respondent Summitville Tiles unlawfully and discriminatorily prohibited its employees from campaigning for the Union and distributing union signs at its facility, (2) whether the same Respondent engaged in surveillance of a union rally in November 1986, (3) whether Respondent Summitville Tiles discharged its employees Michael Cogley and Douglas Jackson because of their union activities, (4) whether Respondent Summitville Tiles discharged its employees Roger and Jenny Minor because of their union activities, (5) whether Respondent Summitville Tiles filed a lawsuit against Michael Cogley and Douglas Jackson because of their protected concerted activity, including the filing of unfair labor practice charges herein, (6) whether Respondent Summitville Laboratories failed and refused to recognize and bargain with the Union, and (7) whether Respondent Summitville Laboratories unilaterally implemented a new employees' handbook for its employees at Summitville Laboratories Division.

On the entire record,[1] including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel, the Respondents, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents are Summitville Tiles, Inc. and Summitville Laboratories Division of Summitville Tiles, Inc. Both Companies are Ohio corporations.[2]

Summitville Tiles has an office and place of business in Summitville, Ohio, where it is engaged in the manufacture and sale of tile and brick. Annually, it purchases and receives products and goods valued over $50,000 from points outside the State.

Summitville Laboratories has an office and place of business in Minerva, Ohio, where it is engaged in the manufacture and sale of adhesives, sealants, and tile care products. Annually, it sells and ships goods and materials valued in excess of $50,000 directly to points outside the State.

The Companies admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, United Steelworkers of America, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In August 1986, the Union commenced an organizational drive at Summitville Tiles, Inc., initially at Summitville Laboratories at Minerva, Ohio, which employs approximately 12 hourly workers. Subsequently, the Union campaigned at the main plant at Summitville, Ohio, which maintains a work force of about 450 employees. The campaign lasted several months resulting in an election on November 14, 1986, for the employees at Summitville Tiles and on November 21, 1986, for the employees at Summitville Laboratories. The Union was defeated at Summitville Tiles, but won the election at Summitville Laboratories and was duly certified by the National Labor Relations Board on April 1, 1987, as the collective-bargaining representative for its unit employees.

In summary, the contentions are as follows: During the union campaign Respondent Summitville Tiles' employees were permitted to campaign against the Union by soliciting and distributing antiunion material in the plant, but the Company prohibited such conduct by its employees on behalf of the Union. On November 11, 1986, prounion employees held a rally near the plant. Summitville Tiles' officials observed the event. It is alleged that Summitville Tiles' conduct amounted to unlawful surveillance. On October 28, 1986, Summitville Tiles discharged its employees Douglas Jackson and Michael Cogley ostensibly for ''stealing time,'' i.e., being ''away from their respective assigned job-work areas with work to do and with Jackson admitted throwing tile'' (R. Br. 27). On December 2, 1986, Summitville Tiles dis-

[1] The record is corrected in accordance with the errata listed in app. E–l to the Respondents' brief.

[2] The Respondents' answer admitted that the Companies are Ohio corporations. However, the Respondents' complaint in the state court alleges that they are Delaware corporations (C.P. Exh. 2).

charged its employees Roger Minor and Jenny Minor ostensibly for ''medical insurance fraud.'' The General Counsel and the Charging Party argue that the employees were discharged because of their union activities. Both parties further contend that Respondent Summitville Laboratories refused to bargain with the Union, and that on March 1, 1987, Summitville Laboratories unilaterally issued a new employee handbook without bargaining with the Union. Finally, the record shows that Respondent Summitville Tiles initiated a civil action in the local court against Cogley and Jackson for malicious prosecution and civil conspiracy. The General Counsel and the Charging Party argue that this lawsuit was baseless and in retaliation for the unfair labor practice charges filed herein and other protected concerted activity.

B. *Independent Violations of Section 8(a)(1)*

1. Solicitation/distribution

The complaint contains three allegations of 8(a)(1) violations. Two of them deal with Respondent Summitville Tiles' rules entitled ''Bulletin Board— Solicitations,'' which provide (R. Exh. 18, p. 22):

> Notices on bulletin boards are not to be removed or altered. No solicitation or distribution of written, printed or other published material during working time, is to be made. Working time does not include break periods, lunch time or any other period during the workday when not engaged in performing work-related duty. Failure to observe this policy will result in immediate discharge.

The Employer had also posted a notice prohibiting the posting of stickers in the plant (Tr. 424).

The General Counsel argues that ''[t]he evidence shows that Respondent disparately enforced a valid rule prohibiting solicitation and allowed anti-Union employees to campaign against the Union on work time while pro-Union employees were prohibited from campaigning in favor of the Union on worktime'' (G.C. Br. 27). The General Counsel further argues that the Company prohibited the distribution and posting of union literature while instructing its employees to fashion antiunion signs and to hang them in the plant. The Respondent contends that the General Counsel has failed to show management knowledge or authorization of any isolated incidents which may have occurred, that the Company has a right to express its views on its own premises, and that, in any case, the allegations were not supported by the charges filed by the Union.

The record shows that the allegations of the complaint are based on three separate charges filed by the Union on preprinted forms (G.C. Exhs. l(a), (f), and (k). The charges deal specifically with the discharges of the four employees, the failure to bargain, and the initiation of the lawsuit. The forms also contain the preprinted language that the ''employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act,'' but the charges do not specifically describe the allegations of independent 8(a)(1) conduct. However, all the allegations of the complaint are closely related to the specific charges. *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 282 (D.C. Cir. 1988); *Redd-I, Inc*., 290 NLRB 1115 (1988). The charges filed by the Union deal with the discriminatory discharges in violation of Section 8(a)(3) and (1) and the initiation of a lawsuit in violation of Section 8(a)(4) and (1), as well as the failure to bargain in violation of Section 8(a)(5) and (1) of the Act. Even if the Board were prohibited from relying on the printed language at the bottom of the form, which is designed to encompass violations of employees' Section 7 rights, the record here indicates that the allegations of 8(a)(1) misconduct, namely, the discriminatory enforcement of the no-solicitation rule and unlawful surveillance, arose out of the same union campaign and a similar factual situation as the alleged discriminatory discharges and the other alleged misconduct. The Respondent's action occurred during the union organizational drive, which set into motion the sequence of events beginning with the posting of union and antiunion material and the staging of a union rally, expression of employee support, and management's reaction, including the discharges. The violations alleged herein are essentially one ''ball of wax'' relating to a vigorous campaign which the Respondent has characterized as ''the 'dirtiest' campaign in the experience of current management.''(R. Br. 24.)

As to the merits of the allegations, the record shows that employees were aware that solicitation and distribution of union literature during worktime was prohibited and that the posting of posters on company property was not allowed. Yet, testimony shows that employees talked to other employees about the Union during working hours. Employee Michael Cogley testified that he observed employee Terry Beadle wearing a ''vote no hat,'' talking to a mill operator during working time in September, ''saying that Summitville didn't really need a union; that they were better off the way they were.'' According to his testimony, Bob Miller, a supervisor, noticed the two employees conversing but took no action (Tr. 60). Another employee, Douglas Jackson, testified that he overheard Supervisor Robert Christen talking to an employee about the Union, ''saying it was no good and that they wouldn't want any part of it.'' Jackson did not recall the employee's name nor precisely when the conversation occurred (Tr. 423). Janet Lautzenheiser, a former employee, recalled during her testimony that employee Frank Savonna talked to groups of employees in the grinder room during their worktime (Tr. 524–525). She overheard him saying ''that he couldn't understand why the people were doing this, how it would do no good; the unions were—the Union would be no good; that Company President Johnson didn't have to bargain with any of the people; he didn't have to do this, he didn't—just things like that.'' She recalled that this conversation occurred right after the Union started, and that her foreman, Charlie Greenwalt, was present at these meetings of employees.

Employee Roger Minor testified that he observed employee Linda Beadnow as she passed out antiunion literature to the employees approximately 1 week before the election. According to Minor, Beadnow distributed the material at the timeclock during her worktime (Tr. 293–294). Minor also conceded that he may have talked about the Union with his crew during worktime (Tr. 359–360).

The Respondent prepared and displayed antiunion signs within its plant on company property (Tr. 1013–1014; R.

Exh. 72).[3] Yet, the Respondent did not tolerate the distribution or the posting by its employees of union material on company property or on companytime (Tr. 294, 531, 534–535, 537–538). For example, Michael Cogley was ordered to remove a union sign from his forklift truck (Tr. 109). In short, the evidence shows that there were more than a few isolated violations of the no-solicitation and no-distribution policy which the Company tolerated when such infractions occurred in its favor. Although the Respondent's policy is presumptively valid, it was discriminatorily and unfairly applied in violation of Section 8(a)(1) of the Act. *Wm. H. Block Co*., 150 NLRB 341 (1964).

2. Surveillance

The complaint alleges that ''Respondent [Summitville] Tiles engaged in surveillance of employees attending a rally held by the Union on public property.'' The Respondent argues that company officials lawfully observed the rally from its corporate property as the rally was expected to draw a large crowd and was intended to be a public event.

The record shows that the Union held a rally on November 11, 1986, in front of the plant along the highway adjacent to company property (Tr. 291, 1363). Approximately 25 to 30 employees and representatives of the Union attended. Present also were the mayor, the sheriff, and local police officials. The Respondent's management expected a larger crowd because the Union had attempted to obtain the support of several local union officials in their efforts to stage the rally. The demonstrators displayed a large sign (a 4-by-7 foot sheet of plywood) stating ''Vote yes for the Union'' (Tr. 291).

Company President Peter Johnson and Vice President David Johnson, as well as several foremen and other company officials, were positioned outside their offices and openly observed the rally. Peter Johnson had a camera in his possession and took photographs of the events. There was testimony that the Company expected a larger parade than a rally of only 30 people. Arthur Kosko, mayor of the small town of Summitville, testified that he had issued a permit for the parade. He had ''heard any number from 200 to 500 was going to attend this parade'' (Tr. 1344). Peter Johnson admitted having a camera and taking pictures when he ''saw this group of people on his property down along the highway'' (Tr. 1977; R. Exh. 120). Johnson testified that he heard rumors that would be a Veterans Day parade with up to 500 people in attendance. After observing the rally from approximately 250 yards, Johnson took the photographs ''purely to show that people were on his property'' (Tr. 1978). He testified as follows (Tr. 1978):

> My purpose in taking them was the fact that there was people on my property, inside the fence, and that was when I went in the office, got the camera, and came back out and took the pictures, purely to show that people were on my property.

Although the rally was a public event, taking pictures of the employees' union activity could be regarded as creating the impression of management surveillance of protected activity. However, where, as here, the purpose of the picture taking was to establish that the participants had been trespassing or demonstrating on company property, the Respondent's conduct does not violate Section 8(a)(1) of the Act. *Berton Kirshner, Inc*., 209 NLRB 1081 (1974), enfd. 523 F.2d 1046 (9th Cir. 1975).

C. *The Discharge of Michael Cogley and Douglas Jackson*

The complaint alleges that Respondent Summitville Tiles discharged employees Michael Cogley and Douglas Jackson because of their union activities. In substance, the Respondent's position is that employee Cogley was fired for cause, ''including verified sabotage of product, defacement of corporate property, insubordination, stealing time in being away from his assigned-designated work station, and aiding/abetting the recognized prohibited dangerous conduct of throwing projectiles in a plant environment'' (R. Br. 2). Jackson was fired for cause, according to the Respondent, ''including insubordination, stealing of time in being away from his assigned designated work station in disruption of production and the inherently dangerous conduct by his own admission of throwing projectiles in a plant environment''(R. Br. 3).

The record shows that Michael Cogley had been employed since August 22, 1977, initially as a laborer, subsequently as a selector and a carrier, and finally as a forklift operator at the time of his discharge on October 28, 1986. The area of his assignment was the color tile department at Summitville Tiles. His work consisted of ''removing pallets from the selecting area and hauling them to the storage area and . . . moving different pallets around . . . various parts of the shop'' (Tr. 1436). During his more than 9-year tenure, Cogley was regarded as a good worker who had never been reprimanded and had an excellent attendance record (Tr. 712–713, 2134).

Cogley was recognized by management as a union supporter (Tr. 2381). He had signed a union authorization card, had attended at least three union meetings, and was a committeeman. For about a month prior to his discharge he regularly wore a union hat (Tr. 45–46). Approximately 1 week prior to his discharge Cogley fashioned a prounion placard and posted it on his forklift for display in the plant. After about an hour, Tom Moore, his supervisor, ordered him to remove the poster (Tr. 109).

Douglas Jackson was also assigned to the color tile department (selection No. 1 area). He was hired on September 2, 1983, as a carrier at Summitville Tiles. His work required him to unload the tile from the kiln cars and to load the tile on selecting tables. After the selectors separated the good tile from the bad, Jackson would then stack the selected tile on pallets. During his 3-year tenure, Jackson was regarded by management as a good and steady worker and as a well-liked employee (Tr. 766–770).

Jackson was also an early union supporter. He had signed a union card, had attended three or four union organizational meetings, and wore a union hat in the plant. The record suggests that management regarded Jackson as an active union

[3] The General Counsel has not objected to the display of these posters (Tr. 112).

supporter.[4] On the day of his discharge, October 28, 1986, Jackson wore a union hat.

The events which precipitated the discharge of both employees were preceded by two incidents. On October 27, 1986, management, consisting of Peter Johnson, the Company's president, David Johnson, vice president, and John Hothem, vice president of manufacturing, distributed to the employees in the plant T-shirts which were white and displayed in red lettering on the front ''VOTE X NO UNION'' (C.P. Exh. 5). On the back, the T-shirts showed the statement ''NO TO STEALWORKERS'' with the intentional misspelling of ''Steelworkers'' (Tr. 48). The second related incident happened 1 day later, on October 28, when Cogley came to work with a T-shirt which contained the logo ''USWA all the way'' on the front and the statement ''Yes to Steel Workers. We steal no more than Johnson's'' on the back. When, about 9 a.m., Cogley exposed the T-shirt, which he had worn under a flannel work shirt, David Johnson was notified by a foreman. Johnson instructed the foreman not to take any action so that Peter Johnson Sr. could handle it personally. At approximately 1 p.m., Peter Johnson, accompanied by John Hothem, approached Cogley as he sat on his forklift in his T-shirt. Peter Johnson ordered Cogley off the vehicle and to follow him, to the color tile department. There, in the presence of the other employees, and after getting their attention, Johnson Sr. loudly ordered Cogley to remove his shirt, repeating: ''I told you to take that damn shirt off.'' Cogley hesitantly complied because he did not wear another shirt. He handed the shirt to Johnson. Johnson Sr. took the shirt, threw it on the floor, stamped on it, and said, ''This is what I think of the Steel Workers Union.'' As Cogley walked to the locker room to get another shirt, Johnson followed him, shook his finger at him, and said, ''If I ever see my name on anything again, I will personally punch you out,'' or ''deck you.'' The employees, including Cogley, were then instructed to return to work. According to the Respondent, no disciplinary action was taken against Cogley as a result of the T-shirt incident.

The events leading to the discharge of Cogley and Jackson occurred several hours later, after they had returned to work. Cogley had completed most of his work prior to the 2 p.m. break, such as ''dumping hoppers, moving full pallets from the designated area to the stock area'' (Tr. 68). About 30 minutes before his 2 p.m. break he parked his forklift truck and walked about 50 feet away from the color tile selecting area to an overhead door. According to his testimony, all his work had been completed, the forklift was hot, and he wanted to cool off. As he stood in the doorway, Douglas Jackson, who had finished unloading the 13th and final car of unselected tile for the day, joined him at the doorway. According to his testimony, Jackson had substantially finished his work and had no immediate duties when he talked to Cogley. During their conversation, Jackson had thrown two small pieces of tile (l-inch pieces) out the door towards a scrap truck, when Peter and David Johnson approached the area. They saw the two employees standing at the doorway talking and observed Jackson throwing the tile. David Johnson inquired what they were doing. Jackson responded that he had picked up scrap tile from the floor and tossed it out. Johnson disputed it, saying: ''Well, no, that's quality one tile and you're costing the company money.'' Jackson explained again, saying, ''I picked it up off the floor'' and ''it was scrap'' (Tr. 416). David Johnson, insisting that he had thrown quality tile, ordered the men to go back to work and to look busy until breaktime. Cogley looked for a broom as he was told and swept the floor. Jackson had returned to his work carrying tile, when Johnson overheard Jackson telling his coworkers that he wished he had worn a ''Vote No'' hat instead of his union hat. Johnson then said, ''Union or no Union, do you think you are going to be able to stand around and throw tile into the weeds?'' (Tr. 417.) Shortly thereafter Supervisor Tom Moore informed Jackson of a verbal warning for his misconduct.

After several minutes, Peter Johnson Sr., accompanied by his son Peter Johnson Jr., returned to the area and, in the presence of several other employees, made another comment about the Union and asked why Jackson was throwing away quality tile. When Jackson replied that it was scrap tile, he told Jackson, ''You're fired for destruction of company property'' (Tr. 52, 419). He turned to Cogley and said: ''As a matter of fact, you're fired, too, for standing there letting him do it'' (Tr. 52, 420). When Jackson inquired whether they were fired merely for throwing scrap tile, Johnson became angrier and ordered them out of the shop ''immediately'' (Tr. 420).

The testimony by both employees consistently related the sequence of events surrounding their discharges, as well as the reasons given by Peter Johnson. Johnson Sr. testified as follows about the episode (Tr. 1984):

> I believe it was my son that came into the plant. I was up in one part of the plant doing something, and they went through. They were going somewhere else up there and they came back and advised me that they—what they had encountered down there, that Cogley and Jackson were at the doorway, off their job station, and they were throwing tile
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> I went down. Doug Jackson was back at his station. I asked him, I said, ''Doug, were you throwing tile?'' And he said, ''Yes.'' I said, ''I'm sorry, but you are fired.'' I went—then went to find Cogley, who was not at his work station. He was back between a row of pallets, and he wasn't sweeping, he was pushing a broom back and forth. I told him, ''You're off your work station and were you witnessing this tile throwing?'' He said, ''Yes,'' and I said, ''You're fired.''
>
> I told both of them, ''Get your buckets and come with me,'' and I escorted them up to the time clock and out the door.

The General Counsel and the Charging Party strongly contend that the true motive for the discharge of the two employees was their union involvement and the Respondent's union animus. The Respondent, in an effort to show that the employees were fired for cause, has offered several reasons, including postdischarge evidence. According to the Respondent, Cogley was discharged ''for unacceptable conduct violative of corporate policies'' by arbitrarily shutting down his high-lift, leaving his work area, engaging in conversation with Jackson, and defacing tile (R. Br. 39–41). The Respond-

[4] Johnson testified that he was not certain of Jackson's union support; however, he stated in an affidavit that Cogley and Jackson were active union supporters, ''demonstrating their support in verbal acts and actions as well as wearing of pro-union clothing'' (C.P. Exh. 39, p. 2).

ent further accused Cogley of ''insubordination,'' ''stealing time,'' ''acting as a lookout for his tile throwing co-worker Jackson,'' being ''abusive in response to management inquiry,'' and ''sabotage participation'' (R. Br. 39–76). The Respondent's reasons for Jackson's discharge are similar, ''aberrant inherently dangerous prohibitive conduct of throwing projectiles, stealing time, being fifty (50) feet from his designated-assigned work area . . . with work waiting for him'' (R. Br. 46, 77–82).

An analysis of the relevant factors regarding the discharge of the two employees shows that the Respondent's reaction to the tile-throwing incident was exaggerated, not in accord with the Company's policy, nor with the Employer's past practice, and that the Respondent offered varying and shifting reasons drawn from essentially the same circumstances. Moreover, the Respondent's union animus, as well as the timing of the discharges, shows that the Respondent's conduct was motivated by the employees' union activities. Without embellishment of the incident, Cogley and Jackson were simply observed by management not working and idly conversing under an open doorway, while Jackson threw a few tiles through the open doorway. As to whether the tile thrown was scrap or quality tile, Jackson repeatedly testified that it was scrap which he had picked up off the floor. David Johnson unequivocally testified that he ''couldn't possibly have seen where Jackson got the tile from''; he ''wasn't there when Jackson picked the tile'' (Tr. 717). Johnson also conceded that there were tiles on the floor in the area where Jackson and Cogley stood and that such tile could have been scrap tile (Tr. 717–719).[5] There is no controversy that Jackson was fired first by Peter Johnson Sr. with the explanation that ''he was fired for destroying company property'' or for ''throwing tile'' (Tr. 52, 419, 1984). Cogley was fired with the explanation that he was away from his work station and witnessing Jackson throwing tile (Tr. 52, 420, 1984). The Respondent has subsequently found additional reasons, such as ''stealing time,'' ''insubordination,'' and ''dangerous conduct,'' for essentially the same incident. The Respondent summarily discharged the employees, who had unblemished work records and who had been in the Company's employ for 3 and 10 years, respectively, following their relatively minor misconduct during the height of the union campaign. Moreover, in spite of the numerous ''grounds'' which the Respondent has assigned to this one episode, the Respondent also relies on evidence accumulated after the discharge to show sabotage.

Arguably, Cogley and Jackson engaged in no particular misconduct whatever; they both testified that they had finished their work assignments. Cogley had completed his work and turned off the engine of his forklift because it was hot and he wanted to cool off. Jackson had substantially finished his work by unloading the last carload of tile and joined Cogley for a few minutes at the doorway, where he idly threw a couple of scrap tiles out the door. The entire episode was brief, possibly less than 5 minutes. To be sure, the unwritten rule for any employee is to avoid looking idle. The Respondent referred to the company rule ''that if no work was available there was always clean-up work and employees were to 'grab a broom''' (R. Br. 80). This is all the employees failed to do. However, there is no basis to suggest—as the Respondent argues—that Cogley ''abandoned his machine,'' ''concealed himself,'' went into ''hiding,'' acted ''as a lookout'' for his coworker, and was ''abusive'' or ''insubordinate'' (R. Br. 72–74). It is equally exaggerated for the Respondent to argue that Jackson's conduct amounted to ''inherently dangerous conduct of throwing tile—projectiles . . . 'blind' across a traveled roadway,'' which was ''harmful to rights or safety of co-workers'' (R. Br. 77–79).

In fairness, the employees' conduct amounted to no more than ''loafing'' or idleness, which the Respondent characterizes as ''stealing time'' Jackson's additional activity of throwing tile could not be equated with destruction of company property because the ''projectiles'' were scrap and, even if it had been quality tile, the monetary worth was indicated by the Respondent to be less than 1 cent (Tr. 787). Indeed, the throwing of tiles by employees was not unusual and was a practice for which another employee received at most an oral warning (Tr. 1418–1427). Other employees had thrown tile from the same area from which Jackson had thrown it without receiving any discipline or without any suggestion that such a practice was considered dangerous (Tr. 481, 1424–1425). Neither employee, Cogley nor Jackson, exhibited an act of insubordination during that episode. At all times, both employees meticulously followed the orders of management, those by Peter Johnson or David Johnson. Yet, David Johnson's explanation for his conclusion that the employees were ''insubordinate'' was that they did not appear to take him seriously or exhibited a defiant attitude (Tr. 930–933). This accusation is unfounded and is belied by Cogley's and Jackson's demeanor. For example, Cogley was earlier subjected to a humiliating experience in the presence of his coworkers when he was ordered to take off his shirt, stood nude to his waist, and was publicly scolded and humiliated by Peter Johnson. The discharge episode in the presence of the other employees was equally humiliating. Yet, both employees kept their composure, followed management's orders, and left the plant quietly and without any sign of resistance.

The Respondent's other and chief reason to substantiate the discharges, namely, the employees' absence from their work area, is specifically covered by the Respondent's work rules (Tr. 813–816, 929–931). However, the rules provide that discharge is indicated only after three infractions. Indeed, the record shows that other employees who had engaged in similar conduct in violation of rule B,3 were simply given warnings (Tr. 943–955).[6]

The Respondent's policy is contained in an employees' handbook (R. Exh. 19). It lists 10 ''work situations'' which would result in immediate discharge as follows:

WORK SITUATIONS

A. These acts will result in immediate discharge.

1. Carelessness resulting in damage to Company property.

[5] There is no reason to doubt Jackson's testimony, for he impressed me generally as an honest and truthful witness, and his testimony is consistent with that of Cogley.

[6] The following employees violated the rule against absence from the work area (rule B,3): Donna Harsh on May 21, 1987; Tony House on March 7, 1986; Patricia Kelly on March 7, 1986; Denise Marra on February 19, 1986; Jeff McCourt on April 21, 1986; Ruth Bergert on March 7, 1986; John McElroy on March 7, 1986; Paul Scarry on March 20, 1986; and James Spencer on April 18, 1986. None of them was fired for the offense (C.P. Exh. 14).

2. Unauthorized removal or attempted removal of any property or records belonging to the Company.

3. Bringing weapons or explosives into the plant or upon Company property.

4. Fighting or provocation which leads to fighting in the plant or upon Company property.

5. Using or possessing intoxicants or illegal, non-prescribed drugs or chemicals in the plant or on Company property.

6. Failure to report personal injury occurring in the course of employment at the time it occurs, unless physically unable to do so.

7. Sleeping during working time.

8. Falsification of a time card, medical statements or other records or making an entry on a time card or other record without authorization.

9. Leaving the plant during working time or not returning to work following lunch break without prior permission from a supervisor.

10. Refusal to follow direction or instructions of a supervisor. No employee will be required to perform any function which would be abnormally dangerous.

The employees violated none of these policies. Although Peter Johnson had initially accused Jackson of destroying company property, the record does not support such an accusation. The tile-throwing incident did not amount to a violation of rule A,l, above.[7] The tile was worthless, and Cogley took no part in that activity. The handbook recites other types of misconduct which could result in a discharge but only after three infractions. These are listed as follows:

B. A third notice of violation of one of the following procedures will result in discharge.

1. Clocking-in or clocking-out prior to fifteen (15) minutes before scheduled starting time or later than fifteen (15) minutes after the end of scheduled quitting time.

2. Entering the plant during non-scheduled hours; attempting to enter the plant where there is a reasonable doubt of ability to work safely or efficiently; bringing unauthorized persons into the plant.

3. Absence form a work station for excessive periods without cause or authorization or leaving the plant to go to the parking lot during a break or during the lunch period.

4. Work below acceptable levels of performance or interfering with the performance of other employees.

5. Failure to use or wear mandatory safety equipment.

6. Failure to park in designated area, or operating vehicles at excessive speed or in a reckless manner in parking areas.

In addition, the Company enforces an absentee policy which similarly has a progressive system of discipline. The Respondent has in the past carefully adhered to its policy and never discharged any employees unless they violated the rules of the handbook. For example, the record shows that, in the 5 years preceding the instant discharges, 23 employees were terminated (C.P. Exhs. 13–14). The reasons which appear on a list of the discharged employees, as well as the testimony of John Hothem, vice president of manufacturing, show that, with the exception of two, the terminated employees were discharged for specific violations of the rules enumerated in the handbook (Tr. 2083–2084). The two exceptions were employees Patty Clark and Gary Lawn. However, they simply were not recalled after an extended leave because of their inability to perform the work (Tr. 2083). There was testimony by David Johnson and Fred Johnson to the effect that the handbook was designed as a mere guide and not as an exhaustive list of infractions which would result in immediate discharges However, that testimony was not supported by the Respondent's past practice.[8]

I accordingly find that the Respondent's decision to discharge the two employees was in total disregard of its past practice and its practice of progressive discipline.

The Respondent also resorted to ''post discharge discovered-developed evidence'' to support the discharge of Cogley (R. Br. 76). Even though the testimony by a handwriting expert was permitted solely for impeachment purposes (Tr. 1615), the Respondent argues that Cogley was fired because of ''sabotage.'' Initially, I reject the Respondent's argument because it is based on evidence received only for impeachment purposes (Tr. 1615). Moreover, any attempt to show that the Respondent had suspicions of such conduct at the time of the discharge is unconvincing. I simply do not credit David Johnson's testimony in which he talked about a ''pretty strong suspicion'' of ''sabotaging products'' (Tr. 797).[9] The alleged act of sabotage was no more than handwriting on two tiles (R. Exhs. 75–76). The handwriting on one tile states: ''This place really sucks.'' The other statement is: ''Have something to say in what goes on in the plant.'' According to the Respondent, these tiles could have been part of a shipment of tiles to a customer. Presumably, such a customer would have the two tiles replaced or simply would have cleaned off the writing because the writing was not etched into the material. The most likely scenario would be that the tile would have been spotted by other employees further down the production line and recovered (Tr. 965). Even assuming that such an incident can be termed ''sabotage,'' the Respondent failed to prove that its ''suspicions'' were well founded on that Cogley was responsible for it. Cogley admitted having written in 1986 a union-related message such as ''Vote yes for the Union'' on a piece of broken 6-by 6-inch tile which would have ended up in the scrap pile (Tr. 963–964). But he specifically and credibly denied having written the statements on these tiles or any finished or quality tile (Tr. 2314). Moreover, in spite of his credentials, Phillip Bouffard's expert conclusion that the writing on the two tiles was that of Cogley is suspect. He was hired by the

[7] The Respondent concedes the point because a violation of that rule is not cited in the brief.

[8] When pressed for examples, the Respondent referred to the termination of 11 employees in 1981 because all of them had walked off their jobs to play poker. That conduct was obviously covered by rule A,9 (Tr. 2070–2071). Another example cited by the Company was the discharge of John Holenchek in September 1986. It was established, however, that he had violated a specific rule (Tr. 2074–2075). The termination of John Hetherington on November 19, 1984, involved the throwing of tile. However, the Respondent conceded that the incident involved a dispute between two employees who threw the tile at each other. This conduct is a violation of rule A,4.

[9] The testimony of David Johnson throughout the proceeding was argumentative, self-serving, and frequently unresponsive to the questions of counsel. Moreover, his demeanor as a witness did not impress me as sincere and honest. He frequently appeared hostile and angry at the questions of counsel and cavalier or arrogant with his responses.

Respondent not to ascertain who among the Respondent's numerous employees wrote the messages on the tiles but to show that Cogley's writing could be matched with that on the tile. Dr. Bouffard conceded that point (Tr. 1704), as well as the failure in his comparison to compare words with words other than a simple letter comparison (Tr. 1705). For these and other reasons, I would reject the handwriting analysis as grossly biased and inclusive.

In any case, the Respondent had never articulated this incident in prior proceedings, such as the unemployment hearing on February 5, 1987 (Tr. 950– 952; R. Exh. 12). And the record shows that the Respondent did not rely on the ''tile defacement'' incident as a reason for Cogley's discharge. Rather, the Respondent has seized upon this incident in an effort to justify the discharge from an apparent realization that the other reasons were insufficient for the purpose of this proceeding.

The mandate of the Act is to prevent unfair labor practices, including ''discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization'' and, as argued by the Respondent, certainly not to ''second-guess'' corporate management or to ''allow employees to hide behind'' their union activity (R. Br. 71). The record here fully demonstrates that the Respondent's discriminatory conduct was motivated by union animus. Johnson's demeanor during the T-shirt incident exhibited the Respondent's outspoken hostility toward the Union. Understandably irritated by Cogley's adverse reference to the Johnson name, Johnson Sr. went beyond a typical display of irritation when he, in a calculated fashion, assembled the employees to witness his contempt for the Union, stamping his foot on the T-shirt and exclaiming, ''This is what I think of the Steel Workers Union.'' In spite of his distinguished position as the chief executive of a reputable corporation, he then pointed his finger at the employee and threatened to deck him. He similarly assembled the employees to witness the discharge of Cogley and Jackson. The Respondent was keenly aware of the two employees' outspoken union support and, in no uncertain terms, sent a message to all employees shortly before the union election that minor misconduct—ordinarily punishable by a warning—was now used to fire two reputable and reliable workers. This message may have served the purpose when the Union was defeated at Summitville Tiles. The Respondent's shifting and exaggerated reasons, the timing of the discharges during the crucial weeks of the campaign, the Respondent's disregard of its own policies, and the disparate treatment toward the two prominent union supporters, all demonstrate that the Respondent violated Section 8(a)(1) and (3) of the Act. Initially blaming Cogley for an absence from his work station and ''stealing time,'' then terming the conduct as insubordination, and finally the belated reliance on some graffiti on two tiles shows the Respondent's disingenuous motives. Similar was the Respondent's first claim of Jackson's destruction of company property, which changed to the absence from his work and ultimately to a violation of safety rules. The Respondent's pretextual reasons do not even suggest a dual motive. Compare *Wright Line*, 251 NLRB 1083 (1980). In the absence of the Respondent's union animus these employees would not have been discharged.

D. *The Discharge of Roger and Jenny Minor*

On December 12, 1987, Respondent Summitville Tiles discharged its employees Roger and Jenny Minor. The Company's official reason for the discharges was ''insurance fraud.'' The General Counsel and the Union argue that the Minors were discharged because of their strong union support. The record shows that Jenny Minor had been employed since January 17, 1983, as a production worker. Her husband, Roger, was hired on August 28, 1984, to work as a mill operator and a refacer on the swing shift. Both employees were active in the union campaign. They regularly wore union shirts and a Steelworkers hat. Roger Minor was an organizer for the afternoon shift, he passed out union literature in the plant, and he was also an observer for the Union during the election (Tr. 288–289). His pickup truck, in which he commuted to work and which was visible to management, displayed a large sign stating, ''Vote 'Yes' on November 14th'' (Tr. 315). Jenny Minor was also a vigorous union supporter who passed out union cards, solicited signatures near the timeclock, and participated in the union rally (Tr. 150–151).

For several years, Roger Minor had engaged in motorcycle racing. One of his companions was his fellow employee and supervisor, David Bartholomew. On September 29, 1985, Roger Minor suffered an accident on a racetrack at Malvern, Ohio, and was injured. He was taken by ambulance to the Aultman Hospital in Canton, Ohio. He falsely reported to the hospital and the ambulance personnel that his injuries were the result of a football accident. He also submitted an insurance claim to Summitville Tiles insurance in which he similarly misrepresented the cause of his injuries (Tr. 301–302). More specifically, the insurance policy with Summitville was written in his wife's name because the Company's policy for both employees was nominally under her name (Tr. 168; R. Exhs. 33–34). The Company paid the claim of almost $9000 (R. Exh. 35).

According to his testimony, Minor reported the accident as a football injury based on a conversation which he had with David Bartholomew in August 1985. During that conversation, Bartholomew said that ''he'd had an accident on his motorcycle and that he had turned it in as being hurt on a three-wheeler'' and, because the insurance had not covered it, ''he was going to turn his in as something else'' (Tr. 301). Bartholomew and Minor were friends, they had raced motorcycles together, and in 1985 Bartholomew purchased a motorcycle from Minor.

Ten weeks after the accident, on September 29, Minor returned to work. According to Minor's testimony, Bartholomew talked to him at that time inquiring about his injuries and stating that ''it was . . . good that he turned it in as something other than a motorcycle injury'' because the company's insurance would not have covered it (Tr. 302–303).[10] Minor also testified about a subsequent conversation with Bartholomew approximately 2 weeks prior to the election. During that conversation, according to Minor, Bartholomew said: ''I can't understand why you're doing what

[10] Bartholomew denied in his testimony that he suggested to Minor to misrepresent his accidental injury (Tr. 1917). However, Bartholomew conceded in his testimony that he had suspected that Minor's injury was the result of a motorcycle accident, and that he did not inform upper management of his suspicions (Tr. 1922, 1961).

you're doing. . . . Being involved with the Union. . . . Well, you know you're not doing right . . . because you made out on your insurance. . . . You know as well as I do that you didn't have the football injury like you stated and that you got hurt on the motorcycle'' (Tr. 304–305).

On November 11, 1986, the day of the union rally, Roger Minor had parked his truck near the highway. His truck displayed the large prounion sign. As he reported for work, Peter Johnson Sr., who had observed the rally with binoculars in his hand, asked him where were all his supporters. Minor replied: ''Well, it's still early. They should be here.'' On the following day, Supervisor John E. Rance received an anonymous tip on a piece of paper (C.P. Exh. 34). It read: ''Just to let you know that Roger Minor's accident last year was a motorcycle accident.''[11] This prompted an investigation by the Company of the insurance claim, which led to a decision by John Hothem and Jack Rance to discharge Roger Minor and Jenny Minor (Tr. 865).

According to Minor, he was called into the conference room and confronted by Hothem and Rance in the following manner (Tr. 311–313).

> John Hothem started questioning me, asking me what had happened on September 29th, 1985, and I told him that I didn't recall the date and I didn't really know what did happen. And he said that I'd had a motorcycle accident on that date, and I told him, I said, ''Well, I'd said football injury.'' And he said, ''Well, it wasn't a football injury. We have proof that you had a motorcycle accident.''
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> . . . .
>
> I'd asked John, I said, ''Well, how come it took a year and a half for you to, you know, start checking into this—well, approximately a year and a half to start checking into this accident?'' And he gave me a real smirky smile like and then said that ''The wheels of justice turn slowly.''

The Union argues that the anonymous note left in Supervisor Rance's office on November 12, 1986, 1 day after the union rally, must have been written by Bartholomew. His knowledge of motorcycle racing and his familiarity with the Malvern racetrack would support such a finding.[12] However, there is no hard evidence in the record on which I could base such a finding. In any case, the timing of the investigation during the height of the union campaign after more than a year had elapsed since the accident, as well as the Respondent's strong antiunion sentiment in relation to the two vigorous union activists, would suggest that the discharges were motivated by union animus. This is supported by Bartholomew's threat to Minor that he should cease his union support in view of the insurance recovery (Tr. 304–305). Bartholomew's denial of such a conversation is not convincing, as is his testimony claiming only rumored knowledge of the motorcycle accident. Bartholomew was Minor's supervisor, he was a personal friend over a period of years, and he was actively involved in the same hobby, namely, motorcycle racing at the same track at Malvern. Bartholomew must have known about the accident and did not inform the Employer until the union campaign.[13] However, the record shows that the Respondent had good cause to discharge Roger Minor once the false insurance claim had been uncovered. The Respondent also had a good reason to suspect that his wife, Jenny Minor, had taken an active part in the falsification of the documents. They were husband and wife. The documents were signed in her name and it was assumed that she had accompanied her husband in the ambulance to the hospital and obviously knew about the accident. The instant situation presents a dual-motive discharge. Here, the Employer has successfully shown that it would have taken the same action regardless of the employees' protected activity. *Wright Line*, 251 NLRB 1083 (1980). Accordingly, I find that the Employer did not violate the Act when it discharged Roger and Jenny Minor.

[11] The Charging Party urges a finding that the note was written by David Bartholomew. However, the record is not clear on this issue.

[12] An examination of the few writing samples in the record and their comparison with the handwriting on the note is inconclusive and speculative (C.P. Exhs. 35–43).

E. *The Respondent's Lawsuit*

The next allegation in the complaint alleges that Respondent Summitville Tiles filed a baseless lawsuit against Michael Cogley and Douglas Jackson in violation of Section 8(a)(1) and (4) of the Act. The record shows that on May 29, 1987, Summitville Tiles initiated a civil action in the Court of Common Pleas, Columbiana County, Ohio (87–Civ–625) against Douglas Jackson and Michael Cogley for ''Malicious Prosecution and Civil Conspiracy for Money Damages with Multiple Discovery Requests.'' (C.P. Exh. 2.) The complaint of the local action seeks a judgment ''in excess of Ten Thousand Dollars'' and ''exemplary-punitive damages in the amount of One Hundred Thousand Dollars'' with attorneys' fees, and alleges that Cogley's and Jackson's filing and refiling of charges with the Board, as well as a lawsuit filed by the employees against Summitville Tiles, amounted to malicious prosecution.

More specifically, Cogley and Jackson had filed a civil action on November 6, 1986, in the Columbiana County Court of Common Pleas against Summitville Tiles for assault and wrongful discharge (R. Exh. 2). The allegations relate to the confrontation on October 28, 1986, between Peter Johnson Sr. and Michael Cogley, as well as the discharges of the two employees. On May 21, 1987, following the issuance of the complaints in the Labor Board cases, Cogley and Jackson filed a motion for dismissal of their local action in Case 86–Civ–1304 (R. Exhs. 1–4). As already stated, the complaints in the Labor Board cases are based on the unfair labor practice charges filed by the Union. The first in a series of charges by the Union were those filed on October 31, 1986, in Case 8–CA–19601 and on January 5, 1987, in Case 8–CA–19756. They were withdrawn by the Union. It filed new charges in Case 8–CA–19867 on February 18, 1987, which resulted in the issuance of one of the present complaints by the Region on April 30, 1987.

The Respondent's complaint of May 29 in the local court for malicious prosecution was based on these repetitive filings of the unfair labor practice charges and the state court action. But Cogley and Jackson had effectively terminated the lawsuit a week earlier on May 21, 1987.

[13] This is supported by the testimony of Minor about a conversation with Robert Christen. The latter told him that Bartholomew had turned him in (Tr. 307–308).

The Columbiana County Court granted summary judgment in favor of the defendants, Cogley and Jackson, on August 26, 1987 (C.P. Exhs. 3–4). In its opinion, the court determined ''that those matters [the issues involved] must necessarily be litigated and determined in proceedings before the National Labor Relations Board, wherein that agency preempts this State Court.'' (C.P. Exh. 4.) In an earlier ruling dated August 4, 1987, the court stated that an action for malicious prosecution under Ohio law requires ''a showing of seizure of person or property, whether actual or constructive,'' which Summitville Tiles had failed to show (C.P. Exh. 3).[14]

David Johnson testified that he proceeded with the malicious prosecution suit against the two employees even though they had withdrawn their suit to recover the expenses incurred in preparing for the suit (Tr. 1139). However, it is clear that the Respondent's efforts went beyond that because the relief requested included punitive damages. It was also conceded in the Respondent's testimony that another purpose of the litigation was to retaliate against the several charges filed by the Union on behalf of the employees (Tr. 1141–1142, 1149–1150).

It is well recognized that Section 7 of the Act ''protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.'' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). The filing of a labor-related lawsuit by employees against their employer seeking actual and punitive damages is considered a protected activity, unless prompted by malice or bad faith. *Trinity Trucking Materials v. NLRB*, 221 NLRB 364 (1975). An employer's interference with that activity violates Section 8(a)(1) of the Act. In addition, Board law has established that an employer violates Section 8(a)(4) by filing a civil suit for malicious prosecution against an employee for filing an unfair labor practice charge. *George A. Angle*, 242 NLRB 744 (1979); *United Credit Bureau*, 242 NLRB 921 (1979).

If an employer's suit against an employee for malicious prosecution can be regarded as baseless and filed for retaliatory reasons, the Board is empowered to enjoin a state court action. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). An analysis of the Respondent's complaint, as well as the testimony, shows that the Respondent's motive was punitive and in retaliation against the two employees and the Union because of their protected activity in filing unfair labor practice charges. Moreover, it is also clear that the gravamen of the Respondent's lawsuit in the state court was preempted by Federal law and properly disposed of by the court. Finally, the Respondent's lawsuit lacked a reasonable basis in fact and in law. This is especially true in consideration of Ohio law, which for an action for malicious prosecution requires a seizure of person or property, actual or constructive. In any case, the Respondent's lawsuit is totally baseless. It is simply ludicrous to suggest that a resort to legal process by two fired and jobless employees to regain their jobs can be defined as malicious prosecution. *Bill Johnson's Restaurants*, supra at 740.

[14] On November 21, 1988, the Charging Party filed a motion to supplement the record herein with the decision of the Columbiana County Court of Appeals, which in a decision dated November 16, 1988, affirmed the trial court. On December 6, 1988, the Respondent submitted a reply and a brief. Judicial notice in the instant case will be limited to the decision by the appellate court without consideration of any factual or legal arguments by either party in this case.

F. *The Refusal to Bargain*

The complaint charges Respondent Summitville Laboratories with violations of Section 8(a)(5) of the Act for its failure to bargain with the Union as the certified bargaining representative of the employees in the stipulated bargaining unit and for its unilateral change of an employee handbook. The Respondent argues that the Union failed to make a timely request to bargain and that the Union has lost the support of its unit employees, all of which relieved the Company from its duty to bargain. With respect to the unilateral changes, it is the Respondent's position that the allegation is barred by Section 10(b) of the Act, and that the preparation of the handbook had preceded the union campaign.

Following an election on November 21, 1986, for the laboratory employees at the Minerva plant, the Union was certified on April 1, 1987 (G.C. Exh. 2). The Respondent's objections to the election dated November 28, 1986, were denied by the Regional Director as untimely (G.C. Exhs. 2(f)–(i)).The appropriate bargaining unit was stipulated (G.C. Exh. 2(j)):

> All laboratory employees employed at the Employer's Brush & Arbor Road, Minerva, Ohio facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On March 1 or 2, 1987, Summitville Laboratories issued a new handbook to its employees (G.C. Exh. 6). Prior to that time and before the election on November 21, 1986, Summitville Laboratories had used the same handbook for its employees that had been in use at Summitville Tiles. (Tr. 1005, 1083; R. Exh. 19.) After the election, the Company decided ''that it was important that . . . . Summitville Laboratories have their own handbook'' (Tr. 1084).[15] The new handbook differed from the old one in several respects. For example, the new handbook eliminated Christmas bonuses and bonuses for perfect attendance; it also provided for performance appraisals, drug testing, and searches of employees' lockers. The new handbook also changed the layoff procedure (Tr. 2130–2132). The old handbook was still in use for the employees of the main facility at Summitville Tiles. It is undisputed that the Respondent issued the new handbook after the election but prior to certification without prior notice to the Union and without bargaining with the Union (Tr. 683–686).

The Union filed a charge on March 12, 1987, relating to the unilateral changes (Case 8–CA–19927), but subsequently withdrew it (Tr. 688–690). On June 9, 1987, the Union filed another charge (Case 8–CA–20159) which in Board language alleged as violations of Section 8(a)(5) and (1) the following: ''Since on or about May 5, 1987, and at all times thereafter, it Summitville Laboratories . . . has refused to bargain collectively'' (G.C. Exh. l(f). Although the specific charges relating to the unilateral charges were withdrawn, the new charges were broadly drafted. They are closely related to and encompass the specific allegations in the amended complaint

[15] Testimony from other company officials indicated that the preparation of the new handbook had begun in December 1985 (Tr. 2101).

(G.C. Exhs. l(r) and (u)). *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 282 (D.C. Cir. 1988); *Redd-I, Inc*., 290 NLRB 1115 (1988). The Respondent's reliance on Section 10(b) is therefore misplaced. Moreover, even though the Respondent effectuated the new employee policy contained in the handbook prior to the Union's certification and during the pendency of objections to the election, the Respondent acted at its peril. The Employer changed the terms and conditions of employment for the unit employees without notifying the Union and without bargaining in violation of Section 8(a)(5) and (1) of the Act. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974).

The record also shows that the Respondent generally refused to honor its bargaining obligation. By letter dated May 4, 1987, William Burga, the Union's subdistrict director of District 27, informed the Company that the Steelworkers ''are prepared to meet with the Summitville Lab Company for the purpose of negotiating a new collective bargaining agreement for the employees'' (G.C. Exh. 3). The Company responded by letter dated May 13, 1987, notifying the Union as follows (G.C. Exh. 4):

> No common purpose would be served by meeting in the interim period at this point in time ''for the purpose of negotiating a new collective bargaining agreement . . .'' beneficial to the employees—company pending resolution of litigatory problems.

The Union replied by letter of May 19, 1987, stating, inter alia (G.C. Exh. 5):

> There are no litigation problems outstanding at Summitville Laboratories, Inc.
>
> Therefore, we renew again our request to commence collective bargaining for our members at Summitville Laboratories, Inc.

In spite of the Union's certification as the employees' bargaining representative and its repeated request to bargain,[16] the Company has unequivocally shown its refusal as further demonstrated by Johnson's testimony (Tr. 1111):

> Q. Is your position as of today that there are problems that preclude your bargaining with the union?
>
> A. Yes.
>
> Q. So that if requested you would not bargain with the union today?
>
> A. Pending the resolution of these litigatory matters in court.
>
> Q. Right. And they haven't been resolved to your satisfaction?
>
> A. No. They have not.

The Respondent's argument that the ''Union has not sought to bargain and employer has not refused to bargain'' or its claim that the Union made ''no legitimate effort to initiate bargaining'' is totally unfounded (R. Br. 102– 103). The Union made two written requests to bargain and the Respondent responded with an unequivocal rejection. A delay of approximately 1 month following the certification is not regarded as an act of dereliction. And the Respondent's objections to the election, which were untimely, are not properly before the Board in this proceeding. The record plainly shows that the Respondent refused to honor its bargaining obligation without any justification,[17]o violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By discriminatorily enforcing its no-solicitation, no-distribution policy, Respondent Summitville Tiles violated Section 8(a)(1) of the Act.

2. By discharging its employees Michael Cogley and Douglas Jackson because of their protected concerted activity, Respondent Summitville Tiles violated Section 8(a)(3) and (1) of the Act.

3. By initiating and maintaining a civil action for malicious prosecution and civil conspiracy against Michael Cogley, Douglas Jackson, and others because of their protected concerted activities, Respondent Summitville Tiles violated Section 8(a)(4) and (1) of the Act.

4. By failing and refusing to bargain with the Union as the certified bargaining agent on behalf of the unit employees of Summitville Laboratories, and by unilaterally issuing a handbook changing the employees' working conditions, Respondent Summitville Laboratories violated Section 8(a)(5) and (l) of the Act.

5. All other allegations in the complaint have not been substantiated.

REMEDY

On concluding that the Respondents have engaged in certain unfair labor practices, I find it necessary to recommend that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Summitville Tiles unlawfully discharged Michael Cogley and Douglas Jackson, Respondent Summitville Tiles will be ordered to offer them reinstatement, and make them whole for lost earnings and other benefits on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings, in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having further found that Respondent Summitville Tiles filed a baseless lawsuit in the Court of Common Pleas, Columbiana County Ohio (87–Civ–625) for malicious prosecution and civil conspiracy against Michael Cogley, Douglas Jackson, and other respondents in retaliation for their protected concerted activities, Respondent Summitville Tiles will be ordered to cease and desist and to withdraw the lawsuit. In addition, Respondent Summitville Tiles must be ordered to place the employees and the Union in the position they would have been absent the violations of Section 8(a)(4) and (1), and to make the employees and the Union whole for all legal expenses they incurred in the defense of the lawsuit, plus interest as computed in *New Horizons*, supra.

[16] Burga also testified that Robert Vasquez, a staff representative of the Union, had attempted to reach Johnson by telephone without success (Tr. 692–693).

[17] The record does not support any contentions that the Union has lost its majority status or that ''unusual circumstances'' existed which justify the Respondent's refusal to bargain. The presumption of the Union's majority status remains.

Having further found that Respondent Summitville Laboratories violated Section 8(a)(5) and (1) of the Act by unilaterally issuing a new employee handbook to the employees without bargaining with the Union and by failing and refusing to bargain with the Union as the certified bargaining representative for the unit employees, Respondent Summitville Laboratories will be ordered to rescind the employee handbook, and to bargain with the Union as the employees' collective-bargaining representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

A. Respondent Summitville Tiles, Inc., Summitville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employees because of their union activities or discriminating in any other manner with respect to their hire or tenure of employment or any term or condition of employment, in violation of Section 8(a)(3) and (1) of the Act.

(b) Discriminatorily enforcing and maintaining a no-solicitation and no-distribution policy which prohibits its employees from campaigning for the Union on company time or on company property.

(c) Prosecuting and further appealing its lawsuit for malicious prosecution and civil conspiracy (87–Civ–625) in the state courts or the Columbiana County Courts against Michael Cogley, Douglas Jackson, and the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Cogley and Douglas Jackson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the discharges of Michael Cogley and Douglas Jackson and notify them in writing that this has been done and that evidence of the discharges will not be used against them in future personnel actions.

(c) Withdraw its lawsuit for malicious prosecution and civil conspiracy (87–Civ–625) filed in the Columbiana County Court and any appeals against Michael Cogley, Douglas Jackson, and the Union and reimburse them for all legal expenses incurred in the defense of the lawsuit, including the appeals, in the manner set forth in the remedy section of the decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Summitville, Ohio, copies of the attached notice marked ''Appendix A.'' [19] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Summitville Laboratories Division of Summitville Tiles, Inc., Minerva, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally issuing employee handbooks or unilaterally changing the terms or conditions of employment for the employees in the following certified bargaining unit:

> All laboratory employees employed at the Employer's Brush & Arbor Road, Minerva, Ohio facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to bargain with the Union as the collective-bargaining representative on behalf of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke the employee handbook and other policy changes in the employees' working conditions as of the time of the election of the Union as the collective-bargaining representative for the unit employees at Summitville Laboratories.

(b) On request, bargain collectively and in good faith with United Steelworkers of America, AFL–CIO, CLC as the collective-bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment.

(c) Post at its place of business in Minerva, Ohio, copies of the attached notice marked ''Appendix B.''[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of National Labor Relations Board.''

[20] See fn. 19, supra.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint allegations not specifically found be dismissed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally issue employee handbooks or unilaterally change the terms or conditions of employment for our employees in the following certified bargaining unit:

> All laboratory employees employed at the Employer's Brush & Arbor Road, Minerva, Ohio facility, excluding all offfice and clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union as the collective-bargaining representative on behalf of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revoke the employee handbook and other policy changes in the employees' working conditions as of the time of the election of the Union as the collective-bargaining representative for the unit employees at Summitville Laboratories.

WE WILL, on request, bargain collectively and in good faith with United Steelworkers of America, AFL–CIO, CLC as the collective-bargaining representative on behalf of the employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment.

SUMMITVILLE LABORATORIES DIVISION OF
SUMMITVILLE TILES, INC.